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IN THE

Supreme Court of the United States

October Term, 1951.

No. 62.

HALCYON LINES AND VINKE AND COMPANY,
Petitioners,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONERS.

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Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

This case comes before the Court on writs of certiorari issued to review final judgments of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed April 3, 1950, appears on R. 175 to 179, inclusive, and R. 221 to 226, inclusive, of the record and is reported in 89 F. Supp. 765. The opinion of Circuit Judge Kalodner of the United States Court of Appeals for the Third Circuit, filed February 21, 1951, appears on R. 229 to 235, inclusive, of the record and is reported in 187 F. 2d 403.

JURISDICTION.

The jurisdiction of this Court to review the final judgments of the United States Court of Appeals for the Third Circuit is provided in Section 1254(1).

The judgments of the United States Court of Appeals for the Third Circuit were each entered on February 21, 1951 (R. 236, 237). Petition for writs of certiorari was granted by this Court on October 8, 1951 (R. 241).

STATEMENT OF THE CASE.

This is a civil action to recover damages for personal injuries under the general maritime law brought by Salvadore Baccile, an employee of Haenn Ship Ceiling and Refitting Corporation, (hereinafter for the sake of brevity referred to as "Haenn"), against Halcyon Lines and Vinke and Company, (hereinafter for the sake of brevity referred to as "Halcyon"), the owners and operators of the Dutch Steamship STAD VLAARDINGEN (R. 6-9, 184-187).

The defendants filed a third-party complaint against Haenn, the plaintiff's employer, claiming contribution or indemnity (R. 13-15, 191-193).

On November 25, 1946, while the vessel was moored at Girard Point, Philadelphia, Haenn, plaintiff's employer, an independent contractor, was engaged by Halcyon to make repairs to grain fittings in the holds of the vessel which had been installed therein for the carriage of a cargo of grain from Montreal to Rotterdam, at which port she discharged her cargo and sailed in ballast to Philadelphia. The grain fittings had been damaged during the carrying and discharging of the cargo carried from Montreal to Rotterdam (R. 156, 202).

On the day of the accident a representative of plaintiff's employer and the surveyor for the New York Board of Underwriters, as arranged by the ship's agents, attended on board to determine the nature and extent of work required to be done on the grain fittings in order to receive the

approval of the surveyor. It was found that the burlap lining on the inside of the grain feeder built in No. 2 hatch had been torn and required replacing (R. 156, 202). In the late afternoon of November 25, 1946, plaintiff and a fellow workman were engaged in the work of replacing the burlap in this feeder and in doing this work the feeder was entered from the main deck of the vessel by placing an extension ladder (which, however, was not extended), the property of Haenn, the third-party defendant, on a plank which was running fore and aft in the bottom of the feeder near the 'tween deck. This plank was placed in the feeder by those who built the feeder in Montreal and was used in connection with its construction, but was not a part of the feeder and was unnecessary to the purpose of the feeder (R. 157, 175, 178, 203, 221, 224). While the ladder was resting on the plank, the plaintiff descended it, stepped from the plank onto one of the ship's steel beams and thence again onto the plank to the rear of the ladder and walked on the plank to the end thereof which was against the after part of the feeder. The plank came free of its fastenings; and the ladder resting on it, the plank itself, and the plaintiff fell to the lower hold, a distance of about thirty (30) feet, resulting in serious and permanent injuries to the plaintiff.

On November 21, 1949, the case was called for trial before the Hon. James P. McGranery. Before proceeding to trial, counsel for all of the parties agreed that the plaintiff was entitled to recover $65,000, and, in accordance with stipulation made in open court, a judgment was entered in favor of the plaintiff in that amount (R. 3).

The case then proceeded to trial on the issue between Halcyon, as third-party plaintiff, and Haenn, as third-party defendant, as to whether either or both were guilty of negligence causing the plaintiff's injuries. Halcyon contended that Haenn was negligent in not properly inspecting the plank in the bottom of the grain feeder on which the ladder was rested, in performing the work in an unsafe manner when it could have been done by other methods

without danger of injury to the plaintiff, and in failing to furnish the necessary safe appliances and equipment with which to perform the work. Haenn contended that it was not negligent and that the representatives of the vessel gave no notice to the plaintiff of the unsafe condition of the plank.

In order to determine these issues, the trial Court submitted to the jury certain interrogatories, the answers to which were to constitute a special verdict (R. 172, 218). In effect, these interrogatories required the jury to answer affirmatively or negatively as to whether either Halcyon or Haenn or both was or were negligent so as to contribute substantially to the plaintiff's injuries. The jury found that both were negligent (R. 173, 219).

In response to the interrogatory as to the percentage of negligence of the respective parties, the jury answered that Halcyon was twenty-five per cent. (25%) negligent and Haenn was seventy-five per cent. (75%) negligent (R. 173, 219).

Halcyon thereupon moved the trial court, on the basis of the jury's answers, to enter judgment in favor of Halcyon against Haenn in the sum of $48,750 on which motion the trial Judge reserved action (R. 174, 220). Haenn filed Motions for New Trial and for Judgment N. O. V. and for Molding the Verdict (R. 3, 182).

On April 3, 1950, after argument, the District Court filed an Opinion and Order dismissing Haenn's Motions for Judgment N. O. V. and for a New Trial and entered judgment in favor of Halcyon against Haenn, in the amount of $32,500, which is fifty per cent. (50%) of the amount paid to the plaintiff by Halcyon in accordance with the stipulation of counsel before the trial (R. 180, 226). Both Halcyon and Haenn appealed to the United States Court of Appeals for the Third Circuit, Haenn in Appeal No. 10,213 because of the judgment against it, and Halcyon in Appeal No. 10,219 because of the action of the District Court in altering the jury's verdict.

Argument was heard on both appeals, and on February 21, 1951, the United States Court of Appeals for the Third Circuit in an opinion by Circuit Judge Kalodner ruled that Haenn was negligent and had a liability to contribute to Halcyon but that such liability was limited to the amount of compensation payable by Haenn to the plaintiff had he elected to receive compensation under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. § 901 et seq.) and accordingly in each of the aforesaid appeals reversed the judgment of the District Court (R. 235).

Judgment in each appeal was entered on February 21, 1951 (R. 236, 237).

Petition for writs of certiorari was filed by Halcyon on May 18, 1951 and granted by this Court on October 8, 1951 (R. 241). Petition for writs of certiorari was also filed by Haenn on July 20, 1951 and granted by this Court on October 8, 1951 (R. 241).

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The petitioner intends to urge the following assigned errors:

1. Those errors relating to the question of the right of the United States Court of Appeals in limiting contribution to the extent that compensation would have been payable to the plaintiff by his employer under the Longshoremen's and Harbor Workers' Compensation Act, i.e., Question No. 1 in petitioners' Petition for Writs of Certiorari.

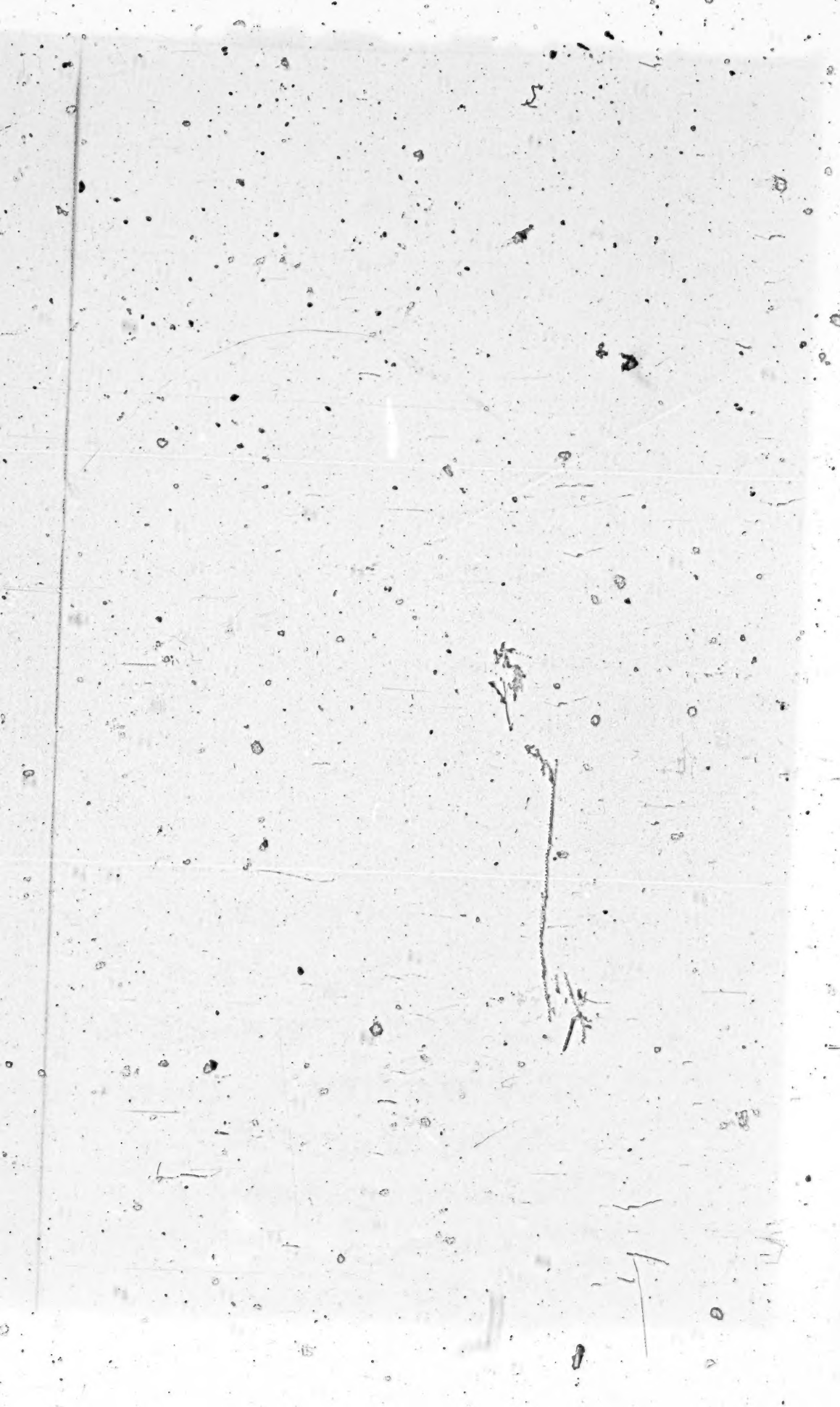
2. Those errors relating to the question of the right in this case for the United States District Court to have entered judgment for contribution on the basis of equal fault rather than the percentage of fault found by the jury, i.e., Question No. 2 in petitioners' Petition for Writs of Certiorari.

QUESTIONS PRESENTED.

The plaintiff, an employee of an independent contractor who had been engaged to repair grain fittings in a vessel, sued the shipowners and operators in a civil action to recover damages under general maritime law for personal injuries sustained while engaged in making such repairs. The shipowners and operators joined the plaintiff's employer as a third-party defendant alleging that it was either solely liable or liable for contribution to any judgment obtained against them by plaintiff. At the trial the jury found by special verdict in response to interrogatories that both were negligent and that the negligence of the shipowners and operators contributed twenty-five per cent. (25%) to the plaintiff's injury and the negligence of the plaintiff's employer contributed seventy-five per cent. (75%) thereto. The District Court then entered judgment in favor of the shipowners and operators for contribution from the plaintiff's employer on the basis of equal fault rather than upon the percentage of fault found by the jury. The United States Court of Appeals for the Third Circuit reversed this ruling and held that the contribution of the plaintiff's employer was limited to the extent of compensation which would have been payable to the employee under the Longshoremen's and Harbor Workers' Compensation Act.

1. Did not the United States Court of Appeals err in limiting contribution to the extent that compensation would have been payable to the plaintiff by his employer under the Longshoremen's and Harbor Workers' Compensation Act?

2. Did not the District Court err in entering a judgment for contribution on the basis of equal fault rather than the percentage of fault found by the jury?



Argument.

SUMMARY OF ARGUMENT.

I. Contribution as Between Joint Tort Feasors Arising Out of a Maritime Cause of Action Should Be in the Proportion of Fault Determined by the Jury and Not Be Either Reduced to an Equal Division of Damages or Limited to the Extent to Which the Employer-Joint Tort Feasor Might Otherwise Be Required to Pay as Compensation Under the Longshoremen's and Harbor Workers' Compensation Act.

(a) The Act Does Not Limit the Amount of Contribution to Be Paid by an Employer-Joint Tort Feasor in a Maritime Cause of Action.

(b) Contribution Should Be in the Proportion of Fault as Found by the Jury at the Trial and Not in the Proportion of Equal Fault as Decided by the District Court.

I. CONTRIBUTION AS BETWEEN JOINT TORT FEASORS ARISING OUT OF A MARITIME CAUSE OF ACTION SHOULD BE IN THE PROPORTION OF FAULT DETERMINED BY THE JURY AND NOT BE EITHER REDUCED TO AN EQUAL DIVISION OF DAMAGES OR LIMITED TO THE EXTENT TO WHICH THE EMPLOYER-JOINT TORT FEASOR MIGHT OTHERWISE BE REQUIRED TO PAY COMPENSATION UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

At the trial the jury found that both Halcyon and Haenn were negligent and that each of them caused or substantially contributed to the plaintiff's injury. However, in response to interrogatories the jury also found as a fact that seventy-five per cent. (75%) of the plaintiff's damages

was attributable to Haenn and only twenty-five per cent. (25%)of his damages was attributable to Halcyon (R. 173, 174, 219).

On a motion for molding the verdict, the District Court entered judgment against the plaintiff's employer in the amount of $32,500.00, which is fifty per cent. (50%) of the plaintiff's recovery (R. 180, 226) on the apparent theory that the rule of equal contribution applied, even though the District Court conceded "that 'comparative negligence is not unknown to our maritime law'" (R. 179, 225).

The United States Court of Appeals for the Third Circuit limited the contribution payable by Haenn to the extent of compensation which Haenn would have been required to pay to the plaintiff under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, as amended; 33 U. S. C. A. § 901 et seq. (hereinafter sometimes referred to as the "Act") had the plaintiff not elected to sue the shipowner (R. 229-235).

(a) The Act Does Not Limit the Amount of Contribution to Be Paid by an Employer-Joint Tort Feasor in a Maritime Cause of Action.

(Point No. 1.)

The Longshoremen's and Harbor Workers' Act, 33 U. S. C. A. § 901 et seq. has no application whatsoever in determining whether one of two wrongdoers may have contribution from the other or as to the amount of such contribution.

Both the District Court and the Court of Appeals have properly held that Haenn is liable to Halcyon for contribution and that the Act does not bar such contribution even though Section 5 of the Act provides that *as between employer and employee*, "his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer on account of such injury or death" the employer's liability under the Act is exclusive (R. 177, 223, 231). However, in

an apparent desire to fulfil what is termed "the social policy" of the Act, the Court of Appeals, without citing any decision or any provision in the Act, has arbitrarily limited such contribution to the extent of compensation which would otherwise be payable under the Act if the plaintiff had not elected to sue the shipowner. The Court of Appeals conceded "as between the employer and a stranger contributing to the injury of an employee, the Act unquestionably falls short of cover" (R. 232). It also recognizes that "Haenn and Halcyon were, to use the preferable admiralty description, 'mutual wrongdoers,'" and that it would be inequitable for Halcyon to bear the entire burden merely because Halcyon had the misfortune to injure one within the Act. Nevertheless, the Court of Appeals by so-called judicial legislation has limited Halcyon's right of contribution from Haenn without any justification therefor either under the Act or under any decision of this Court or any lower federal court.

Limitation of the amount of contribution to be paid joint tort feasors was neither within the specific provisions of the Act nor within the spirit or purpose of the Act.

The Act itself does not specifically contain any such limitation nor can such limitation be implied from any of its various provisions. The only section which might be considered to have any bearing on this precise question is Section 5 which provides that the liability of an employer *to his employee or to any one suing "to recover damages . . . on account of such injury or death"* shall be sole and exclusive under the Act.

If Congress had intended to include the liability of an employer to a joint tort feasor, it could easily have done so. But the Act is silent as to such liability. Neither specifically nor inferentially does the Act proscribe or limit the right of a third party to recover contribution from an employer for damages arising out of the mutual fault. *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. C. A. 9, 1950); *Hitaffer v. Argonne*

Co., 183 F. 2d 811 (C. of A. D. C. 1950, cert. den. 340 U. S. 852).*

In *Hitaffer v. Argonne Co., supra*, at 819, the Court said:

"There can be no doubt but that this section is designed to make the employer's liability under this statute exclusive of any other liability either at law or in admiralty *to the injured employee or anyone suing in the employee's right.* But where a third person is

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*As stated in petitioners' Petition for Writs of Certiorari, the decisions of the various United States Courts of Appeals are presently in confusion as to the effect of the Act in situations like the instant case. There are presently existing three distinct and separate views by four different United States Courts of Appeals with respect to the liability of employers to third parties under the Longshoremen's and Harbor Workers' Compensation Act.

In *American Mutual Liability Insurance Co. v. Matthews*, 182 F. 2d 322 (C. C. A. 2, 1950) it has been held in the Second Circuit that the employer of a plaintiff-longshoreman is not liable for contribution for an injury caused by the mutual fault of his employer and a third party.

In *United States v. Rothschild International Stevedoring Co., supra*, an exactly opposite conclusion was reached. The Court of Appeals for the Ninth Circuit allowed *full* indemnity in favor of the shipowner against the stevedoring company on the ground that its negligence was the active or intervening cause of the plaintiff's injury.

In *Hitaffer v. Argonne Co., supra*, the United States Court of Appeals for the District of Columbia, in a suit by the employer's wife against his employer for loss of consortium, ruled that the Act had no effect upon the common law liability of a stevedore-employer to a third party, even though she be the wife of its employee.

The Court-below in this case has taken a position midway between that of the United States Court of Appeals for the Second Circuit, as expressed in *American Mutual Liability Insurance Co. v. Matthews, supra*, and that of the United States Court of Appeals for the Ninth Circuit, as expressed in *United States v. Rothschild International Stevedoring Co., supra*, and of the United States Court of Appeals for the District of Columbia, as expressed in *Hitaffer v. Argonne Co., supra*.

The conflict among the various circuits was recognized by the Second Circuit in the case of *Slatterly v. Marra Bros., Inc.*, 186 F. 2d 134, 139 (C. C. A. 2, 1951) in which, after referring to the *Rothschild* case, it held that there could be no contribution between joint tort feasors when one of them was covered by a state compensation act and that any right of indemnity must exist independently.

See also *Spaulding v. Parry Nav. Co.*, 187 F. 2d 257 (C. C. A. 2, 1951) in which the same Court again dismissed a third-party complaint for contribution from the plaintiff's employer. A petition for certiorari has recently been filed with your Honorable Court in that case (No. 54. October Term, 1951) on the ground, inter alia, that the decision is contrary to the decision in the instant case and action thereon is still pending. Moreover, the rule to be followed in the federal Courts has been further confused by the decision of the District Court of the District of Columbia in the case of *Liberty Mutual Insurance Co. v. Vallendingham*, 94 F. Supp. 17 (D. C. D. of C. 1950) which held, notwithstanding the implications of the *Hitaffer* case, *supra*, to the contrary, that the Act prevented an employer from being subjected to liability for contribution.

suing in his or her own right on account of the breach [of] some independent duty owed them by the employer, even though the operative facts out of which this independent right and correlative duty arose are the same as those out of which the injured employee recovers under the Act, *the Act does not proscribe the third person's cause of action.* Thus in a case where the employer had secured payment under the Act to the injured employee and the employee thereafter brought an action against the third party, joint tort feasor, that party was allowed to implead the employer in order to get contribution." (Citing *The Tampico*, D. C. N. Y. 1942, 45 F. Supp. 174.) (Italics ours.)

Such a limitation is also foreign to the spirit and purpose of the Act. The fundamental purpose of the Act was to provide a system of compensation to longshoremen and harbor workers injured or killed on navigable waters which could be speedily recovered *by them* irrespective of negligence of the employer or contributory negligence of the employee. *Nogueira v. New York, New Haven & Hartford Railroad Company*, 281 U. S. 128, 131 (1930). Such compensation was based on the theory that industrial accidents, whether due to negligence or not, should be borne by the industry. *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244, 249 (1941); *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 255 (1940); *Wheeling Corrugating Co. v. McManigal*, 41 F. 2d 593, 595 (C. C. A. 4, 1930). However, when two or more members of industry each contribute to injuring an employee of one of the wrongdoers, no valid reason exists to permit the employer-wrongdoer from not bearing (as between the wrongdoers) its share of damages which the employee-plaintiff may recover at law from the other third party-wrongdoer. The third party's liability to the employee is not limited by any compensation act, and it clearly was neither within the spirit nor within the purpose of the Act to limit the employer's liability for compensation merely because as between employer and employee the Act

had limited the employer's liability to the payment of compensation under the Act.

A third party should, therefore, be entitled to recover contribution without any limitations or restrictions read into the Act by so-called judicial legislation.

Such had also been the holding of various District Courts. *Rederii v. Jarka Corporation*, 26 F. Supp. 304 (D. C. Me. 1939); *The Tampico*, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942); *The S. S. Samovar*, 72 F. Supp. 574, 588 (D. C. N. D. Cal. 1947); *Portel v. United States*, 85 F. Supp. 458, 462 (D. C. S. D. N. Y. 1949).

An analogous situation was presented by the enactment of the Harter Act (Act of February 13, 1893, c. 105; 46 U. S. C. A. §§ 190-195) which, inter alia, relieved a vessel of liability for losses from faults or errors in navigation if due diligence had been observed in making the ship seaworthy. Notwithstanding this exemption from direct responsibility of the vessel to cargo, a non-carrying vessel (which has been in collision with the carrier) may recover in part from the carrier for the damages previously recovered from the non-carrying vessel by the cargo. *The Chattahoochee*, 173 U. S. 540, 555 (1899). Similarly in *The Delaware*, 161 U. S. 459, 470 (1896) (where no question of cargo was involved) the owner of The Delaware had contended that the Harter Act absolved him from liability to another ship for collision damage which had resulted from negligent operation. The Court rejected such a construction of the Harter Act on the ground that legislative history showed that the Harter Act was intended to be applied only as between the carrier and cargo and had nothing to do with liability between ships. So in this case is the Longshoremen's and Harbor Workers' Act concerned only with the liability between employer and employee and has nothing to do with liability for contribution between joint tort feasors.

Finally (assuming, without admitting, that the Act does restrict or limit the amount of contribution between two tort feasors) neither the Act nor the Court below by

its judicial legislation has provided any procedure for determining in advance what in each given case will be the amount of compensation which the stevedore-employer would have ultimately been required to pay if its employee had not elected to sue the third party. In fact, in many cases it will be difficult, and perhaps impossible, to determine such amount for a great number of years.

No one can tell at the time of trial what an employee may be entitled to receive under the Act. It is impossible for anyone to determine *in advance* when an employee's disability will be changed or modified or will finally cease; yet an employer's liability under the Act is dependent, *inter alia*, upon these facts. Did Congress intend by the Act to substitute the Court or a jury in a civil action to make *in advance* findings of fact which it specifically provided in the Act should be found by the Deputy Commissioner? What is the method of appeal or review with respect to a finding of the kind contemplated in the instant case by the Court-below? Should the case be certified to the Deputy Commissioner for review or for separate findings or should they be reviewed as other causes of action are reviewed? What effect has the death of the plaintiff upon the amount to be contributed by the employer-tort feasor? Further consideration will bring to mind many other difficult and perplexing questions the determination of which in some instances will be impossible and in other instances will be at the best no more than a guess or estimate.

Obviously, the Court of Appeals in attempting to extend what it calls "the social policy" of the Act has created further confusion instead of clarifying the rights and liabilities of joint tort feasors in situations like the instant case and has erroneously attempted to establish a rule, unsupported by legislation or decision, which in many cases may be impractical and, in some instances, impossible of application.

(b) Contribution Should Be in the Proportion of Fault as Found by the Jury and Not in the Proportion of Equal Fault as Decided by the District Court.

(Point No. 2.)

The only fault attributable to Halcyon is that it failed to inspect and failed to warn Haenn of the alleged defective conditions of the plank. Since Haenn, which specialized in this kind of work, had the free choice of the manner and means of doing it, with no notice to Halcyon of what it intended to do, it is obvious that Haenn's faults are greater in number and are more serious in character.

Is it mandatory upon the Court or within its discretion —after a jury has found that one of the two wrongdoers was responsible for the accident to the extent of seventy-five per cent. (75%) of the plaintiff's damages—to set aside and disregard such findings (supported by substantial evidence) and to rule, as a matter of law, that contribution in admiralty shall always be in the proportion of equal fault as between wrongdoers whose negligence caused the plaintiff's personal injury?

The accident in this case occurred aboard the S. S. Stad Vlaaringen while she was in navigable waters (R. 13 and 17, Par. 4). It is well settled that such a cause of action is maritime in character and that admiralty principles will be applied, irrespective of whether the action be brought at law in a state court or in a federal court. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 88 (1946); *Garrett v. Moore-McCormack Co., Inc.*, 317 U. S. 239 (1942).

This principle was recognized by the District Court, and we think there can be no doubt as to its correctness and applicability to this case (R. 179, 225).

The District Court also recognized that comparative negligence was also a part of the admiralty law (R. 179, 225), but, without citing any basis for its ruling, the Court said that it was "constrained, in the circumstances of this

case, to abide by the general admiralty rule of equal contribution" (R. 179, 225).

It is difficult to determine exactly whether the District Court was following what it conceded to be the admiralty rule of equal contribution because of the fact that such was the rule, or whether "in the circumstances" it was exercising its discretion in rejecting comparative contribution. If the latter, we submit that there was an abuse of discretion because the circumstances of this case furnish no basis for not awarding comparative contribution, if that were legally permissible. The parties had submitted the question of their respective faults to the jury and their finding is fully supported by the evidence. Interrogatories were submitted to the jury for the express purpose of obtaining their appraisal of fault, and there is no reason why it should be rejected in favor of a substitute finding by the trial Judge.

Certainly the facts present no unusual "circumstances" requiring the discard of the jury's appraisal of fault. Haenn was an independent contractor and had complete control over its employees who had possession of the part of the vessel where the work was being done and who chose the means and method of doing it. The salient facts showing fault on the part of Haenn are summarized by the District Court, as follows:

> "Within the number 2 feeder there was a stage planking, about 10 inches wide, supported on cleats nailed to opposite bulkheads of the feeder, at a height of about 30 feet above the bottom of the hold. It appeared from the evidence that this planking had been built and left by the stevedoring company which had installed the feeders. The plaintiff Baccile, one of the carpenters Haenn had sent to work on the ship, and his foreman proceeded to the number 2 feeder with a ladder, part of Haenn's equipment, and lowered it onto the planking. They tapped the planking with the bottom rung of the ladder, in an effort to 'sound' for

cracks and test for sturdiness. Baccile then climbed down the ladder to the staging, the ladder meanwhile resting on the plank, unsecured at the top except for the foreman's hold on it." ((R. 175, 221)

* * *

"Apparently the third-party defendant assumes that the only negligence which could have been found by the jury was based upon Haenn's failure to make an inspection of the condition of the cleats supporting the plank. Because there was no evidence that such an inspection would have disclosed a defect, it is urged that there was no duty to inspect. See Bruszewski v. Isthmian S. S. Co., 163 F. 2d 720. However, the record discloses other evidence from which the jury might properly have found that Haenn did not perform the work in a reasonably safe manner, under the Court's instruction, by undertaking to do the work in the manner in which it did, at a height of some thirty feet above the bottom of the vessel. Particularly pertinent in this connection is the testimony of the master of the vessel as to how, in his expert opinion, the work should have been performed, by the use of a Jacob's ladder or lashed hatch boards; the testimony of the boatswain Westerhoff that he performed a similar operation (cleaning the grain feeder) by lowering himself into the feeder with a rope ladder and using a hatch cover to stand on; and the testimony of the Chief Surveyor for the Board of Underwriters of New York and Philadelphia that the stage planking served no useful purpose in connection with the grain feeder, but was merely put in for the convenience of the grain fitter in erecting the fittings." (R. 177-178, 223-224)

The only fault attributable to Halcyon is that it failed to inspect and failed to warn Haenn of the alleged defective conditions of the plank. Considering the fact that Haenn which specialized in this kind of work and had the free

choice of the manner and means of doing it, with no notice to Halcyon of what it intended to do, it is obvious that Haenn's faults are greater in number and are more serious in character.

If the decision of the District Court as to the extent of the contribution be considered as an exercise of discretion in disregarding the jury's finding, we submit, in consideration of the foregoing, that this was an abuse of discretion.

The determination of the correctness of the judgment of the District Court depends upon whether, as a matter of law, contribution between joint tortfeasors in admiralty arising out of damages for personal injury can be awarded *only* for *half* of the damages.

It is conceded that in *collision* cases the established rule in this country is that contribution in admiralty is in equal shares regardless of the respective degrees of fault.

Even the admiralty rule of half damages in collision cases is regarded by some as being antiquated in the world of today. This rule was inherited from the English, and our courts have doggedly adhered to it although England has abandoned it in favor of proportionate damages based upon comparative fault since 1913 when it ratified the Brussels Convention of 1910. All of the major powers of the world, with the exception of the United States, are signatories or adherents to that Convention.

In the recent case of *National Bulk Carriers, Inc. v. United States*, 183 F. 2d 405, 410 (C. C. A. 2, 1950), in a dissenting opinion, Judge Learned Hand, referring to the half damage rule, said:

> "I do not mean that I should divide the damages equally, if I were free to divide them proportionately to the relative fault of the vessels. An equal division in this case would be plainly unjust; they ought to be divided in some such proportion as five to one. And so they could be but for our obstinate cleaving to the ancient rule which has been abrogated by nearly all

civilized nations. Indeed, the doctrine that a court should not look too jealously at the navigation of one vessel, when the faults of the other are glaring, is in the nature of a sop to Cerberus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits. Nevertheless, so long as our antiquated doctrine prevails, I think we should apply it unflinchingly, and in the case at bar I would divide the damages."

But this is not a collision case, and the doctrine of equal division of damages should not be considered in determining the extent of contribution as between joint tortfeasors in a case of personal injury.

We can find no decision of your Honorable Court where the precise question was considered or decided. However, in *American Stevedores, Inc. v. Porello*, 330 U. S. 446 (1947), this Court has indicated a clear recognition of the existence in admiralty of the doctrine of comparative negligence and that there may be comparative contribution as between joint tortfeasors in a case arising out of personal injury.

In the *Porello* case the question involved was whether a stevedore was required under the indemnity provision in a stevedoring contract with the government to indemnify the government and, if so, to what extent, against a claim for personal injuries by one of the stevedore's employees. This Court held that the contract was not sufficiently specific to determine that question and remanded the case to the district court to determine the meaning of the contract, recognizing the possibility that the contract might be inapplicable to the facts of the case, in which event this Court stated that the district court would be free to adjudge the responsibility of the parties to the contract under the applicable rules of admiralty law. Before reaching this conclusion this Court in an opinion by Mr. Justice Reed stated on page 458:

"Finally, the parties may have intended that American, in case of the joint negligence of the parties, should be responsible for that proportion of the damages which its fault bore to the total fault. Although the usual rule in admiralty, in the absence of contract, is for each joint tortfeasor to pay the injured party a moiety of the damages, *The Alabama*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *Barbarino v. Stanhope S. S. Co.*, 151 F. 2d 553, we do not believe that the last alternative, which provides for a measure of comparative negligence, is necessarily beyond the intent of the parties. *Comparative negligence is not unknown to our maritime law. The Max Morris*, 137 U. S. 1; *The Henry S. Grove*, 22 F. 2d 444; see Robinson on Admiralty, p. 91. From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that court, which shall have the benefit of such evidence as there is upon the intention of the parties. If the District Court interprets the contract not to apply to the facts of this case, the court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law." (Emphasis supplied.)

While it may be contended that the *Porello* case does not definitely hold that comparative negligence is to be applied and that the above quoted language is dictum, we think that this is not so as the case was remanded to the district court to determine whether the contract applied and, if not, to make such decision as was proper in accordance with principles of admiralty law, having already observed that comparative negligence was not unknown to admiralty law. The contention that the decision of this Court is dictum is fully answered by the opinion of Judge Kirkpatrick in *Coal Operators Cas. Co. v. United States*, 76 F. Supp., 681, 683 (D. C. E. D. Pa. 1948), as follows:

"Now what the Supreme Court said was not di
tum. The Supreme Court was remanding the case
the District Court with instructions and in the senten
quoted was telling the District Judge that, absent t
contract of indemnity, he would be free to apply t
admiralty rule of contribution. The Circuit Court
Appeals had squarely ruled that there could be no co
tribution and the Supreme Court, although it did n
mention the position of the Circuit Court of Appeal
certainly must have intended to overrule it."

In that case Judge Kirkpatrick further stated: (p. 683

"Contribution between joint tortfeasors in ad
miralty is usually to the extent of one-half of the awar
although it may be that the Court may fix the respon
sibility in some other proportion."

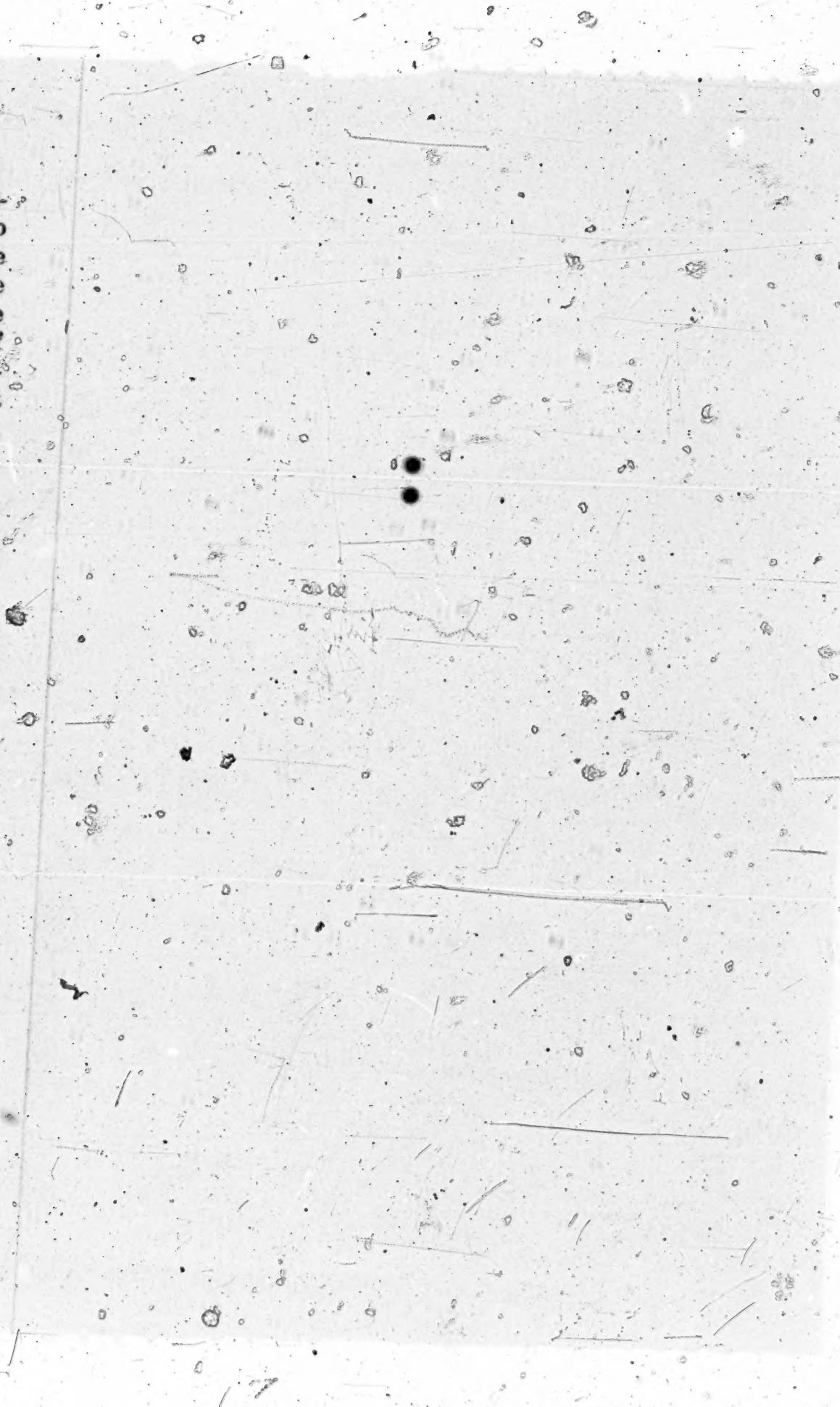
The idea of comparative negligence is found in early cases in admiralty, particularly in personal injury cases. It was expressly recognized by this Court in *Smith v. Socony-Vacuum Oil Co.*, 305 U. S. 424, 431 (1939).

In *The Explorer*, 20 Fed. 135 (C. C. E. D. La. 1884), the Court, after discussing the negligence of the claimant, said (page 139):

"However, from all the authorities examined, I am disposed to hold that in cases of marine torts it is the rule of the courts of admiralty to exercise 'a conscientious discretion and give or withhold damages upon enlarged principles of justice and equity.'"

In that case the Court's award was for only part of the claim, the court stating that it would not be consistent with enlarged principles of justice and equity to award the claimant anything for damages and thus reward his negligence. It did not divide the damages in half.

In *The Max Morris*, 137 U. S. 1 (1890), this Court said that contributory negligence in a case such as the one then before it should not wholly bar recovery. This Court did not settle the method of division of damages but stated:



"Whether, in a case like this, the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it" (p. 15).

The Court affirmed the award to the injured sailor of his wages for the period of disability and the denial of any sum for pain and suffering.

Recently in an opinion by Judge Learned Hand in *Guerrini v. United States*, 167 F. 2d 352 (C. C. A. 2, 1948, cert. den. 335 U. S. 843), the Court of Appeals for the Second Circuit remanded the case to the district court for further findings but stated that if liability was found against the defendant, the plaintiff's recovery should be reduced to the extent of 75%.

In the case of *Portel v. United States*, 85 F. Supp. 458 (D. C. S. D. N. Y. 1949), the facts were very similar to those here. In that case the plaintiff was injured as a result partly of his own negligence and partly because of the negligence of the vessel and of his employer, who was an independent contractor performing repair work on the ship's machinery. In that case the Court held that plaintiff's recovery should be reduced by 25% and that the vessel should bear 40% of the loss and his employer 60%. The Court in that case stated (p. 462):

"Although contribution among joint tort-feasors is usually to the extent of one-half the award, the court may fix the responsibility in accordance with the proportion which the fault of each bore to the total fault. See American Stevedores v. Porello, 330 U. S. 446, 458, 67 S. Ct. 847, 91 L. Ed. 1011, and cases therein cited."

The *Portel* case has not been appealed, notwithstanding (according to advices to us by one of the attorneys in the case) that the court on application refused to revise its

findings as to the extent of contribution between the two defendants.

In *Kreste v. United States*, 158 F. 2d 575 (C. C. A. 2, 1946) in a suit by a longshoreman for personal injuries against the owner of a vessel the Court of Appeals reversed the judgment for the libellant and remanded with directions to make specific finding as to the extent of the libellant's negligence in order that the damages could be apportioned.

In *Stokes v. United States*, 144 F. 2d 82 (C. C. A. 2, 1944) the Court of Appeals stated that a division of damages on a 30%-70% basis would not be considered erroneous, although it reversed because the evidence of record did not show that the libellant was negligent in any particular.

It is clear from the foregoing authorities that in personal injury cases the half damage rule in collision cases is not applied, but that the damages are apportioned according to the degree of fault.

This is in accordance with the legislative policy of this country. The Jones Act (46 U. S. C. A. § 688) has specifically brought into the admiralty the provisions of the Federal Employers Liability Act, which recognizes that there may be varying degrees of fault and provides that the negligence of the claimant shall not bar recovery but only may be considered in mitigation of damages. *Smith v. Socony-Vacuum Oil Co.*, 305 U. S. 424 (1939).

The Congress has recognized that there may be varying degrees of fault and has not provided for a denial of recovery to the plaintiff because of his negligence, nor has it specified that should the plaintiff be negligent his recovery should be cut in half. If, in the same case, two defendants are found to be negligent and liable to the plaintiff and it appears that their negligence is in widely varying degrees, then as between them there is no logic in saying that automatically they shall each be responsible for one-half, because the jury can as well apportion the amount of contribution commensurate with the fault of both defendants, as it could in reducing a plaintiff's recovery by reason

of his own fault. In both instances we are approaching as nearly as possible exact justice.

From the foregoing it is, therefore, clear that the doctrine of comparative negligence is now firmly imbedded in our admiralty law in cases of personal injury. It has been adopted as a proper approach toward fairness and justice. The same approach should apply in situations of contribution between joint tort feasors. Contribution on a comparative basis was suggested by this Court in the *Porello* case *supra*, and was awarded in *Portel v. United States*, *supra*, in consonance with existing principles of admiralty law.

CONCLUSION.

We, therefore, submit that the judgments in the Courts below should be reversed and the case remanded with directions to enter judgment in favor of Halcyon and against Haenn in the sum of $48,750.00, with interest and costs, being the proportionate amount of damages which the jury found was caused by the negligence of Haenn.

Respectfully submitted,

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